In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 6073

JOSEPH HAYDEN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE GEORGE M. BOURQUIN, *Judge*

BRIEF OF APPELLEE UNITED STATES OF AMERICA

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FILED
MAY 21 1930
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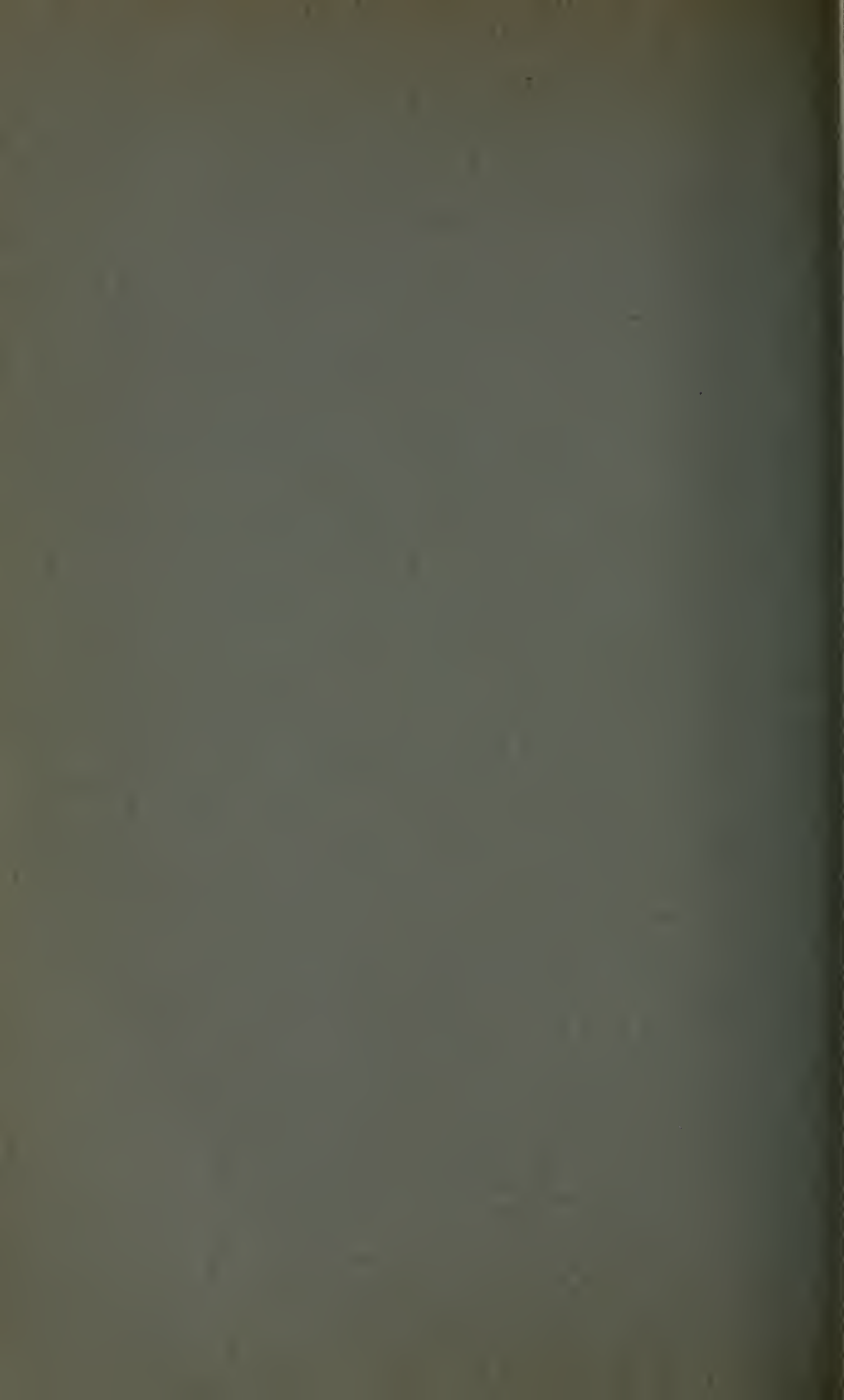
CLERK



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STATEMENT OF THE CASE

The statement of the case and the assignments of error relied upon by the appellant herein are fully set forth in the brief of appellant.

ARGUMENT

1. EXCLUSION OF EVIDENCE

It must be perfectly evident to this Court that the Court below did not err in refusing to admit in evidence Plaintiff's Exhibit 2. This Exhibit was not identified, is not shown to have been signed by any person authorized, and further is not competent or pertinent to the issues in the case at bar due to the fact that it deals with the assured's rating for compensation purposes only. It is well settled that the ratings of the Veteran's Bureau on compensation claims and payments on the same are not admissible in a suit against the government on a war risk insurance policy where the sole issue is the presence or absence of a permanent and total disability which precludes the assured from following continuously any substantially gainful occupation.

Golden vs. The United States, 34 Fed. (2nd) 367.

The rules laid down in the Golden case dispose of appellant's assignments of error 1 and 3.

Furthermore, there is no merit to appellant's

assignment of error number 1 due to the fact that the letter from the Veteran's Bureau referred to therein is plainly on a mimeographed form and probably mailed out by some typist from the Veteran's Bureau whose deductions may or may not have been based upon record facts, and as said by this Court in passing upon a similar question in *U. S. vs. Tracy*, 28 Fed. (2nd) 570 (9th C. C.A.), the letter "is incompetent to establish the correctness of such conclusions; the interest of the government cannot thus be put at jeopardy, nor does the vindication of plaintiff's rights require such a rule. If the typist's deductions were based upon record facts, the records are available to the plaintiff."

It will thus be seen that this Court in the *Tracy* case reversed the trial Court for receiving in evidence a letter similar to that which the plaintiff sought to have admitted in evidence at the trial herein.

2. PERTINENT STATUTES AND REGULATIONS

Section 400 of the Act of October 6, 1917 (40 Stat. 409):

> "That in order to give every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protection for themselves and their dependents than is provided in Article III, the United States, upon application to the Bureau and without medical examination, shall grant insurance against the death or total permanent disability of any such person in any multiple of $500, and not less than $1,000 or more than $10,0000, upon the payment of the premiums as hereinafter provided."

Section 402 of the Act of October 6, 1917 (40 Stat. 409):

> "That the Director, subject to the general direction of the Secretary of the Treasury, shall promptly determine upon and publish the full and exact terms and conditions of such contract of insurance. * * * *"

Section 404 of the Act of October 6, 1917 (40 Stat. 410):

> "Regulations * * * * shall prescribe the time and method of payment of the premiums thereon, but payments of premiums in advance shall not be required for periods of more than one month."

Treasury Decision No. 47 W. R., promulgated July 25, 1919, and in force at the time of the discharge of the insured in this case:

> "When any person insured under the provisions of the War Risk Insurance Act leaves the active military or naval service for reasons not precluding the continuation of insurance, the monthly premium which, had he remained in the service, would have been payable on the last day of the calendar month in which he was discharged, will be payable on the first day of the calendar month following the date of his discharge, and thereafter monthly premius shall be payable on the first day of each calendar month. The premium payable on the first day of any calendar month may, however, be paid at any time during such month, which shall constitute a grace period for the payment of such premium. If the premium is not paid before the expiration of such grace period the insurance shall lapse and terminate."

Under this regulation and the admitted facts a premium became due in this case on June 1, 1919. It is undisputed that that premium was not paid, and it is further undisputed that unless the insured

became totally and permanently disabled during or prior to June 30, 1919, recovery can not be had.

Total permanent disability under this contract is defined by Treasury Decision No. 20 W. R., a regulation promulgated under and pursuant to statutory authority. It provides:

> "Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed, in Articles III and IV, to be total disability.
>
> " 'Total Disability' shall be deemed to be 'permanent' whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. Whenever it shall be established that any person to whom any installment of insurance has been paid, as provided in Article IV, on the ground that the insured has become totally and permanently disabled, has recovered the ability to continuously follow any substantially gainful occupation, the payment of installments of insurance shall be discontinued forthwith and no further installments thereof shall be paid so long as such recovered ability shall continue."

Regulations of the Bureau, promulgated pursuant to statutory authority, have the force and effect of law and the Court will take judicial notice

thereof. (*Cassarello vs. U. S.*, 279 Fed. 396, C. C. A. (3rd); *Sawyer vs. U. S.*, 10 Fed. (2nd) 416, C. C. A. 2nd).)

3. THE PLAINTIFF DID NOT MAKE OUT A PRIMA FACIE CASE

To recover in this case it was necessary for the plaintiff to prove and sustain the burden that rested upon him by a fair preponderance of the evidence that (1) the insured became totally disabled on or before June 30, 1919, and (2) the total disability was permanent on or before June 30, 1919.

To carry this burden five witnesses were produced. The plaintiff, his mother, his brother, a physician who examined him shortly prior to the trial herein, and one Fairburn who testified concerning the Veteran's Bureau records regarding the plaintiff herein.

The bill of exceptions, beginning on page 14 of the transcript of record herein, and continuing through to page 39 of the transcript herein, sets

out in narrative form the testimony relied upon by the plaintiff.

Analyzing the testimony of the plaintiff's physician who was called as his first witness it seems apparent that, briefly paraphrased, he testified to no more than that: (Tr. 15-18)

> That he first examined the plaintiff on the 8th of October, 1929, several weeks before the trial herein, and that he never saw him before that time. That the plaintiff's trouble is due to transverse myelitis, which is a lesion of the spinal cord, and he found nothing else than the transverse myelitis which would keep him from following many types of gainful occupations, and that the transverse myelitis was his only disability. (Tr. 18)
>
> He further testified that the cause of the transverse myelitis in his opinion was due to the fact that he had been hit with a shell. (Tr. 19) Transverse myelitis more or less paralyzes some muscles and some sensations below the point of lesion. The shell entered plaintiff's back about the level of the second lumbar vertebra, and destroyed, evidently, more or less of the nerve tissues. There is hypersensitiveness above the lesion. That is typical in these cases,—something pulling,—there is a loss of sensation to pin pricks, which is practically total in the right thigh, and a loss of ability to distinguish between heat and cold in the entire right leg and thigh. There is more disability in the left leg for the muscles are more paralyzed there. The reflexes,

known as knee jerks, are a little increased on both sides. There is a difference in the size of the thighs, the left one being smaller than the right. There is lack of tone in the muscles,—they have wasted away to a certain extent. Difference in size in the thighs is due to paralysis of the muscles of the left leg. There is a scar in the front of the abdomen which is sensitive. He has inflammation of the bladder.

There has been a fissure or fracture in the third lumbar spine so that this part of the transverse process was loosened. The area on the top of the vertebra is not smooth. The entrance of the piece of shell was opposite the second lumbar vertebra, and therefore must have been going downward and inward when it hit, and the injury was to the transverse process.

Plaintiff's skin is sensitive to the touch to any irritation above the point of injury. When the shell hit his spine there was more or less of an explosive effect, tearing the nerves and causing damage to the spinal cord. The plaintiff is nervous and unstable and in pain. He could not study or engage in physical exertion because he can't use his leg sufficient to do anything required of him, and can't use his arms. He can work steady only one or two days, either in physical or in mental work. He will never be well. (Tr. 17-18)

The testimony of the next witness, O. G. Fairburn, from the Veteran's Bureau at Seattle, shows

that the plaintiff was given the following ratings by the Veteran's Bureau: (Tr. 19)

> Temporary partial twenty per cent from the date of separation from active service to April 28, 1921. Temporary partial ten per cent from April 28, 1921, to January 6, 1922. Total temporary from January 6, 1922, to January 30, 1922. Temporary partial ten per cent from January 30, 1922, to June 16, 1922. Permanent total from June, 1922, to date. These ratings of disability are on account of the transverse myelitis. They are on account of the gunshot wound and the transverse myelitis, and made as a result of examination of the doctors of the Veterans' Bureau.
>
> On cross-examination Fairburn testified: That the first examination was on August 22, 1919, and he said there was no diagnosis of transverse myelitis at that time. The first rating was made on that condition. The next examination was on August 29, 1919, signed by the United States Public Health Service. There was no diagnosis of transverse myelitis made at that time. There was no nerve disability diagnosis either in the examination of August 22, 1919, or August 29, 1919. The gunshot wound was the only thing found on this examination in the diagnosis. The next examination was made June 14, 1920, by Dr. Paul I. Carter. The diagnosis was wound at back healed, flat feet. There was no diagnosis of transverse myelitis or of any nervous disability at that time. The next examination was April 28, 1921. The diagnosis was pleuritic adhesions; pes planus

> bilateral; wound in back; cicatrix of skin; abdominal wall. No transverse myelitis or any nerve disability was found on that examination. The examination report does not show a diagnosis of any nerve ailment or nerve involvement. (Tr. 21.)
>
> The next examination was June 14, 1921. A chest examination was made May 3, 1921. Under the June 14th examination the report does not show any transverse myelitis or any nerve condition or ailment or disease, but only flat feet, pleuritic adhesions, scars in the skin and wound on the back.

On redirect examination Mr. Fairburn of the Veteran's Bureau testified:

> That the total permanent rating was based on examination of June 27, 1922, and that said diagnosis showed transverse myelitis, flat feet, gunshot wound in back and abdominal wall healed, also wound contused; also myelitis transverse. (Tr. 21)
>
> Fairburn further testified that the records of the government show the first diagnosis of transverse myelitis was made on the examination of June 27, 1922, which examination was made by Dr. Calhoun, who is now dead. (Tr. 22)

The witness stated that the history of the development of the disability shown on the report is as follows:

> "Following gunshot wound October, 1918,

lower limbs entirely paralyzed. *Gradually got better until a year ago, since which time condition has been stationary until a month ago.* At that time began to notice present symptoms and they seem to be gradually growing worse." (Tr. 22).

That report was made June 27, 1922.

Briefly paraphrasing the substance of the testimony of the plaintiff herein, who was the next witness, (Tr. 22) we find that he testified: (Tr. 23)

> That he was struck by a shell in France, was sent back to the states and from New York went to Camp Lewis and was in the hospital from October, 1918, until the date of discharge. When he came home he had pains in the leg and back that gradually disappeared. He did not do any work when he got back during the year 1918. Suffered pains in the legs and was very nervous. Couldn't walk very well. In the latter part of 1919 he went into training with the Government in the City Light Substation at Lake Union, learning how to be a station operator. He was there two or three months and was transferred to the Y.M.C.A. He stayed in training at the Y.M.C.A. two or three months and attended classes. He then went to Wilson's Modern Business College in July, 1920, and discontinued training there in 1921. During that time he took the examination for a postal clerk and tried said work one to three hours in the evening which tired him out. In the year 1921 he worked in the post office for a short time in

the evenings, one to three hours. During that time he felt quite well and sometimes not very good. (Tr. 25) His legs pained him and got numb. During the Christmas rush he worked at the post office. (Tr. 26) He left the business college in August, 1921, and stayed at home. In January, 1922, he went to Port Townsend hospital and was there a month. In May, 1922, he went to work again in the post office and quit the 15th of June when he went to the Providence Hospital. He was there three days and then went to Portland, Oregon until August 9, 1923. Most of the time in bed. His legs had been numb from the waist down and he had been weak and nervous and could not walk, and he has not been free from pain since his discharge. (Tr. 27)

On cross-examination (Tr. 27), he stated that he went in training in 1919, and was at the City Light Department and stayed there two or three months. From January, 1920 to May 7, 1920, he was at the Y.M.C.A. When he left there he went for further training to Wilson's Modern Business College from July 1, 1920, until about August 7, 1921. He admitted signing an application for employment as a postal clerk with the United States Civil Service Commission in 1920. This application was admitted in evidence and is government's Exhibit 4. He also admitted signing government's Exhibit 5, which was a medical certificate of an examination of the plaintiff by C. H. Turpin, January 22, 1921. He stated he worked in 1921 during the Christmas rush, and that while he was at Wilson's he would work in the evening for one to three hours off and on. After he got out of Wilson's Business College he worked three or

four days at Christmas time in the post office. That was after the Civil Service examination. He did not work when they needed him; between August, 1921, and the end of 1921 he worked during the Christmas rush. (Tr. 30) He may have worked a few hours off and on during February, March and April, 1922. He was discharged June 6, 1919, and paid no premiums on his insurance after discharge. (Tr. 30)

He stated that when he submited himself for examination to Dr. Turpin as shown in Exhibit No. 5, that was a very short examination. (Tr. 31)

On Recross-examination he stated he remembered the examination, but didn't remember who examined him.

Government's Exhibit 5 admitted in evidence as a part of the cross-examination of the plaintiff, with his signature affixed thereto, shows in detail the physical condition of the plaintiff at the time of the examination, to-wit, January 22, 1921, and shows that he was not permanently and totally disabled at that time. It shows that the applicant at that time was capable of prolonged and severe mental and physical exertion, and was equal to the demands of a very exhausting occupation and that there was no heart trouble and that the respiratory action of plaintiff's lungs was unobstructed. It showed further that the

plaintiff had at that time no defect in the functions of the brain or nervous system and that his limbs were normal and that there was no defect in arms or legs.

Government's Exhibit 5 referred to herein was admitted in evidence by the court below, subsequent to the time that the same had been used as a portion of a deposition on behalf of the government herein, and is found on the page following page 16 of the deposition of Dr. C. H. Turpin, which has been transmitted by the Clerk of the District Court to this Court, which deposition is not of itself an exhibit in this case, the only portion thereof being admitted in evidence being Dr. Turpin's report, government's Exhibit A-5, attached to page 16 of said deposition.

William G. Hayden testified as follows:

> That he was the brother of the plaintiff. That he observed the plaintiff when he came home from the war and that he was irritable and when he worked in the post office he seemed to be worse, and that he had observed evidence of plaintiff being in pain ever since he came back. (Tr. 32-33)

Mrs. Emma Hayden, plaintiff's mother testified: (Tr. 33)

> That ever since plaintiff came back from the army he had been at her house and she had observed his nervous condition.

With the introduction of the foregoing evidence plaintiff rested and the government moved for a non-suit and the motion was granted.

In the case of *Interstate Compress vs. Agnew*, decided by the Circuit Court of Appeals for the Eighth Circuit, and reported in 276 Fed. 882, it is stated:

> "The rule in these courts (Federal Courts) is that in each case tried by a jury the question of law always arises at the close of the evidence whether or not there is such substantial evidence of the plaintiff's cause of action as will sustain a verdict in his favor and warrant the trial court in refusing in the exercise of its judicial discretion to set a verdict in his favor aside if rendered, and any evidence, a scintilla of evidence is not sufficient to warrant such a refusal. This question of law arises on a request for a peremptory instruction made before the case goes to the jury. The jurisdiction is conferred and the duty is imposed upon the trial court to decide it and, on exception, upon the appellate court to review that decision. The jury has no jurisdiction of this issue of law, and its verdict after the trial court has decided it does not deprive the appellate court of its jurisdiction or relieve it of its duty to review its decision by the trial court."

In *Northern Pacific Railroad Company vs. Jones*, 144 Fed. 47, the Court said:

> "Where, from any proper view of the undisputed or established facts, the conclusion follows as a matter of law that the plaintiff cannot recover, it is the duty of the trial court to direct a verdict. (Cases cited)"

In *Commissioners, Etc., vs. Clark*, 94 U. S. 278, 284; 24 L. Ed. 59, 61, the Court says:

> "Decided cases may be found where it is held that, if there is a scintilla of evidence in support of a case, the judge is bound to leave it to the jury; but the modern decisions have established a more reasonable rule, to-wit, that, before the evidence is left to the jury, there is or may be in every case a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed."

In *U. S. vs. Blackburn*, 33 Fed. (2nd) 564 (9th C.C.A.), the Court stated as follows:

> "While the testimony was ample to prove temporary total disability no witness, professional or lay, testified as to the nature of the illness from which the deceased was suffering, or as to the cause of his disability. The jury was left wholly to speculation and guess work on both of

> these questions. Furthermore, the record fully discloses the fact that more satisfactory testimony was within the reach of the appellee. The physician whom the deceased consulted six months after leaving the army was not called as a witness, nor was any reason assigned for not calling him. The same may be said of the failure to call any of the physicians who must necessarily have attended the deceased during his long confinement in the different hospitals. In short, the jury was left with little or nothing to guide them in determining the vital issues in the case."

A study of the evidence in the Blackburn case will show that the plaintiff therein made a stronger prima facie showing to entitle the case to be submitted to the jury than was made on behalf of the plaintiff in the instant case. In the Blackburn case shortly after the deceased's discharge he consulted a doctor and was incarcerated in the hospital for a year. After that he spent a winter in the government hospital at Walla Walla and a winter or winters in the government hospital at Arizona, and later the deceased who was the assured in that case went to Monrovia, California, where he died in 1925. In the instant case, however, the assured immediately went in training after his discharge. He was in the City Light Department for three months. He then

went to the Y.M.C.A. for several months. After leaving the Y. M. C. A. he went to Wilson's Modern Business College and was there over a year. In 1920 he applied for a position with the postal department as evidenced by government's Exhibit No. 5, the application with the Civil Service Commission. While he was studying at Wilson's Modern Business College he worked during the evenings at the post office and it was not until late in 1922 that he went to the hospital. Obviously, if the evidence was insufficient to be submitted to the jury in the Blackburn case, no error was committed by the court below in granting the government's motion for a non-suit, due to plaintiff's failure to make a prima facie case.

Recalling here that total permanent disability within the contemplation of the contract now under consideration is defined by Regulation Treasury Decision No. 20 W. R., hereinbefore set out, and referring to paragraph three of the complaint wherein it is alleged that total permanent disability ensued on October 5, 1918, by reason of the insured having been wounded by a high explosive shell, and applying the "harsh" rule as referred to in *Commissioners, Etc. vs. Clark, supra,* it is submitted that there is

not a scintilla of evidence disclosed by the record of the plaintiff's case showing or tending to show that the insured was totally and permanently disabled at the time alleged or within the life of the policy. There was no medical testimony to show the physical condition of the plaintiff at the time of his discharge or at the time of the lapsation of the insurance. No physician examined him until immediately prior to the trial, to-wit, October, 1929. It is true that the evidence discloses at some time the plaintiff was injured but the evidence adduced in behalf of the plaintiff does not sustain the burden which rests upon him to prove a prima facie case by showing a total and permanent disability during the lifetime of the policy. There was not sufficient testimony adduced as to the nature of the illness from which the plaintiff was suffering or as to the cause of his disability, and certainly Dr. Hooker's testimony and the examination of Dr. Turpin as evidenced by government's Exhibit No. 5 do not disclose that by reason of the gunshot wound received in October, 1918, the plaintiff was, on or before June 30, 1919, permanently and totally disabled and thereby precluded from following continuously a substantially gainful occupation. Dr. Hooker did not testify that the present

condition came on instantly at the time plaintiff was struck by the shell. The evidence shows that the plaintiff got better until the report of June 27, 1922. (Tr. 2) The examinations of the Veteran's Bureau physicians show that he was only 20% disabled, and in 1921, two years after the lapsation of the policy, plaintiff was still found only 20% disabled. In May, 1921, he was rated temporary partial 10%. In January, 1922, temporary total from the 6th day of January to the 30th day of January, 1922, but the Court must bear in mind that this was two years after the policy had expired. A little later, in May of that year, he was rated 10%, and from June of that year he has been rated totally and permanently disabled.

Mr. Fairburn, one of the plaintiff's witnesses from the Veteran's Bureau, testified that none of the physical examinations of plaintiff as disclosed by the Veteran's Bureau, showed a diagnosis of transverse myelitis until the examination of January 27, 1922, and all through the examinations, twice in August, 1919, June, 1920, and April and May, 1921, until June, 1922, the only ailment of plaintiff was shell wound and flat feet, scarred abdomen, showing

wound in back and adhesion, on which the Veteran's Bureau gave him the above mentioned ratings.

Drawing from plaintiff's evidence every justifiable, favorable inference, it is submitted that the plaintiff utterly failed to make a prima facie case, and that the trial court did not err when, at the end of plaintiff's case, it granted the government's motion for a non-suit.

Plaintiff cites in his brief *U. S. vs. Sligh*, 31 Fed. (2nd) 735. What limitations there may be on the interpretation of the doctrines laid down in the *Sligh* case is best evidenced by the statement of Judge Dietrich in *U. S. vs. Barker*, 36 Fed. (2nd) 557 (9th C. C. A.), wherein he stated as follows:

> "From the facts shown to hold total disability would be to do violence to any common or reasonable understanding of the meaning of these terms. Not without hesitation we sustained the right of the plaintiff to recover in the *Sligh* case, 31 Fed. (2nd) 735, but to go further and yield to the contention of the plaintiff herein would be to ignore one of the material limitations of the policy."

La Marche vs. U. S., 28 Fed. (2nd) 828, is cited by the appellant in its brief herein. A casual perusal of the opinion of this court in that case will

show that the proof adduced in that case was much stronger on behalf of the plaintiff than in the case at bar. In the *La Marche* case plaintiff at the time of his discharge was examined by doctors and informed that he was suffering from shell shock. He was then treated for affliction of the nose and shortly after discharge proof showed he was in a nervous condition and unable to sleep. Shortly after his discharge and after the lapsation of his insurance the plaintiff in the *La Marche* case became seriously ill and was removed to the hospital. As already stated, the evidence in the case at bar does not disclose a continuous or permanent state of hospitalization until 1922, and furthermore affirmatively shows that immediately and for some time after his discharge and after the lapsation of his insurance the assured was engaged in vocational training and in other work.

In *McPhee vs. U. S.*, 31 Fed. (2d) 243 (9th C. C. A.), this court said:

> "In view, however, of another trial, we deem it proper to say that in our judgment the motion for a directed verdict was ample to challenge the sufficiency of the evidence, and should have been sustained."
>
> "We can find no evidence in the record

showing or tending to show that the appellee was totally and permanently disabled at any time before the policy expired. * * * "

"Total and permanent disability within the meaning of a war risk insurance policy does not mean absolute incapacity to do any work at all. *But there must be such impairment of capacity as to render it impossible for the assured to follow continuously some substantially gainful occupation, and this must occur during the life of the contract.*"

"War risk insurance is not a gratuity but an agreement by the Government, on certain conditions, to pay the assured certain sums per month if he becomes totally and permanently disabled while the contract of insurance is in force. The burden is on one suing on such a contract to show that he was in fact permanently and totally disabled, at some time before the contract lapsed." (Emphasis ours)

The judgment of the trial court granting the government's motion for non-suit was correct and proper and the judgment of dismissal should, therefore, be affirmed.

Respectfully submitted,

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